

56. As noted above, we also modified our generic auction rules to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant.¹²⁰ We now modify Section 24.822 (b) to clarify the applicability of this provision to broadband PCS. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant. Amendments to FCC Form 175 must be filed with the Commission within two business days of any such change. Our experience in the nationwide narrowband PCS auction demonstrated that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change of control or discussions that violate our anti-collusion rules. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Again, we clarify that this change applies only to applicants that have not applied for licenses in any of the same geographic license areas.¹²¹

57. We will also permit ownership changes in which consortium investors drop out of bidding consortia, even if control of the consortium changes as a result.¹²² We do not wish to restrict some members of consortia from continuing to bid even though other members of the consortia wish to drop out of the bidding. We emphasize that members that are removed from a consortium may not subsequently bid individually or become involved with another bidder in bidding on any license for which the consortium had applied. Bidders must submit a revised Form 175 to reflect the change in ownership.

58. We also wish to clarify an aspect of our rules dealing with the information that applicants must provide to the Commission with their Form 175 and Form 401 applications. Section 24.813(a)(1) of the Commission's Rules, 47 C.F.R. §24.813(a)(1), states among other things that applicants must provide "a list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, *stockholder* or key management personnel of the applicant." (Emphasis added.) Read literally, this provision would require applicants to ascertain the holdings in other concerns of every one of their stockholders, regardless of how small that stockholder's stake in the applicant may be. This was not our intent, and we take this opportunity to amend this rule to clarify that only holdings in other concerns that are held by attributable shareholders in the applicant

¹²⁰ *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 52.

¹²¹ Of course, formation of consortia, bidding agreements, and new ownership arrangements remains subject to Commission review under the public interest standard, and we would expect that entities entering into such arrangements would comply with all relevant Commission policies and all other applicable laws, *e.g.*, the antitrust laws.

¹²² *See ex parte* submission of Comcast Corporation, Oct. 7, 1994.

need be disclosed.¹²³

59. Finally, we note that in the *Second Memorandum Opinion and Order*, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership interest with another applicant.¹²⁴ We stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. As we stated in the *Second Memorandum Opinion and Order*, this prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.¹²⁵ Communication among bidders concerning matters unrelated to the license auctions, however, will be permitted.

60. Accordingly, we are retaining the collusion rules in the broadband PCS context with the modifications set forth above.¹²⁶ We believe that these modifications will ensure that the bidding process is competitive and will encourage formation of a competitive post-auction market structure,

D. Miscellaneous

¹²³ By "attributable" shareholder we mean a shareholder that holds an interest of 5 percent or more in a bidder or that holds an attributable interest in a bidder through the operation of the multiplier.

¹²⁴ *Id.* at ¶ 53.

¹²⁵ Of course, applicants will also be subject to existing antitrust laws. For example, we would expect that this would prohibit discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market. See *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), 434 U.S. 938 (1977); *c.f.*, *e.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *modified and aff'd* 175 U.S. 211 (1899). In addition, agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. See, *e.g.*, *United States v. MMR Corporation (LA)*, 907 F.2d 489 (5th Cir. 1990); *United States v. W.F. Brinkley & Sons Construction Co.*, 783 F.2d 1157 (4th Cir. 1986); *United States v. Finis P. Renest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 874. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are *per se* violations of the Sherman Act (*United States v. Topco*, 405 U.S. 596 (1972); *Affiliated Capital Corporation v. City of Houston*, 700 F. 2d 226, 236), and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990).

¹²⁶ See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 225.

1. Antenna Height Restrictions

61. The Commission established antenna height restrictions in the *Fifth Report and Order* which provide, in part, that no antenna structure, including radiating elements, tower, supports and all appurtenances, may be higher than 61 meters above ground level unless prior Commission approval is obtained.¹²⁷

62. Petition. American Personal Communications (APC) requests that the antenna height restrictions be rescinded because they were adopted without comment in a proceeding intended to adopt PCS auction and application processing rules, not substantive technical ones.¹²⁸ Noting that the Commission has already established antenna safety and interference provisions, APC also maintains that the rule is unnecessary. APC further argues that the rule would impose a regulatory burden on PCS providers that is not imposed on either cellular or enhanced specialized mobile radio (ESMR) providers, a result that is incompatible with the Commission's efforts to achieve regulatory parity.¹²⁹ Finally, APC maintains that the implementation and enforcement of this rule would consume significant industry and staff resources without gaining any appreciable benefit.¹³⁰

63. Decision. In light of APC's petition, we believe that issues relating to antenna height are best resolved in another proceeding, to afford a greater opportunity for industry comment. Our primary concern when we adopted this rule section was to promote the safe location and identification of PCS antennas, particularly in areas around airports. There may be less administratively burdensome methods, however, of obtaining the same result. Moreover, Section 24.816, may be duplicative since Part 17 of our rules already provides for similar antenna height and use safeguards.¹³¹ We therefore rescind the antenna height restrictions adopted in the *Fifth Report and Order*, but will examine the issue in a future proceeding on revisions to Part 24 of our rules. The substantive merits of APC's petition, as well as the arguments set forth in oppositions filed by PCIA and DCR Communications, Inc., will be considered at that time.¹³²

2. Restrictions on Cellular Participation

¹²⁷ *Fifth Report and Order*, FCC 94-178 at Appendix B (Section 24.816). Section 24.816 also contains restrictions on height and use of antennas around airports.

¹²⁸ APC Petition for Reconsideration (APC Petition), filed Aug. 22, 1994, at 4.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 47 CFR Part 17.

¹³² PCIA Opposition at 1-3; DCR Communications, Inc. Opposition at 8.

64. In the *Fifth Report and Order*, we reserved specific spectrum blocks in broadband PCS for bidding exclusively by entities that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million.¹³³ We determined that designation of these "entrepreneurs' blocks" was needed to ensure that small entities have a meaningful opportunity to participate in the acquisition and provision of broadband PCS services.¹³⁴

65. Petition. GTE alleges that our entrepreneurs' block plan, which is intended to ensure that designated entities have opportunities to acquire licenses and provide PCS service, restricts the ability of cellular carriers to participate in the provision of PCS.¹³⁵ Specifically, GTE argues that many cellular operators can now only bid on a maximum of 20 MHz instead of 30 MHz of spectrum, which will impair their ability to compete with other PCS operators. Accordingly, GTE requests that we eliminate several cellular restrictions adopted in our broadband PCS service rules proceeding.¹³⁶ First, GTE encourages the Commission to eliminate the cellular-PCS cross-ownership restrictions to permit cellular carriers to obtain 30 MHz of spectrum in any MTA in the country.¹³⁷ Next, GTE requests we modify our geographic overlap standard for purposes of determining cellular eligibility.¹³⁸ Specifically, GTE requests we adopt an "effective pops" test that it has previously advocated in the PCS proceedings. Finally, GTE requests that we permit cellular carriers to acquire up to 30 MHz of spectrum, so long as they divest the appropriate cellular properties within 90 days of the PCS license grant.¹³⁹

66. Discussion. We reject GTE's proposal to eliminate certain cellular restrictions, as its request is outside the scope of this proceeding. Rather, those restrictions were appropriately addressed in our broadband PCS service rules proceeding, GN Docket No. 90-314.¹⁴⁰ As Pacific Bell points out in its Opposition, the Commission considered arguments

¹³³ *Fifth Report and Order*, FCC 94-178 at ¶ 121.

¹³⁴ *Id.*

¹³⁵ GTE Petition at 2.

¹³⁶ *Id.* at 6-8. See *Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) at ¶¶ 97-111.

¹³⁷ GTE Petition at 6.

¹³⁸ *Id.* at 6-7.

¹³⁹ *Id.* at 7-8.

¹⁴⁰ *Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) at ¶¶ 97-111, *recon. Memorandum Opinion and Order*, FCC 94-144 (Rel. June 13, 1994) at ¶¶ 98-

identical or similar to the ones raised by GTE in that proceeding and concluded that our restrictions strike an appropriate balance between fostering broad participation in PCS and ensuring that cellular operators do not exert undue market power.¹⁴¹ Accordingly, we will retain our present restrictions on cellular participation in the provision of PCS. We will address the merits of GTE's claim that they will be unfairly disadvantaged by the creation of entrepreneurs' blocks in our reconsideration order on designated entity concerns.¹⁴²

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

67. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Memorandum Opinion and Order* is as follows:

68. Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rule Making* in this proceeding and published Final Regulatory Flexibility Analyses within the *Second Report and Order* (at ¶¶ 299-302) and the *Fifth Report and Order* (at ¶¶ 219-222). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

69. Summary of the Issues Raised by the Public Comments. No commenters responded specifically to the issues raised by the *Fifth Report and Order*. We have made some modifications to the proposed requirements as appropriate.

70. Significant Alternatives Considered and Rejected. All significant alternatives have been addressed in the *Fifth Report and Order* and in this *Memorandum Opinion and Order*.

B. Ordering Clauses

71. Accordingly, IT IS ORDERED that the petitions for reconsideration ARE

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¹⁴¹ Pacific Bell Opposition at 10-11. *See also Second Report and Order*, 8 FCC Rcd 7700 at ¶ 108.

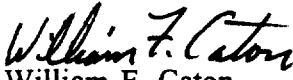
¹⁴² *See also Omnipoint Opposition* at 11-12.

GRANTED to the extent described above, DEFERRED with respect to entrepreneurs block issues and DENIED in all other respects.

72. IT IS FURTHER ORDERED that Part 24 of the Commission's Rules IS AMENDED as set forth in Appendix B.

73. IT IS FURTHER ORDERED that the rule amendments made herein WILL BECOME EFFECTIVE immediately upon publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).¹⁴³

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

¹⁴³ Pursuant to 5 U.S.C. § 553(d)(3), we conclude that "good cause" exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to finalize their bidding strategies and business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns that last-minute modifications to our Rules would impede the success of their auction plan. See 5 U.S.C. § 553(d)(1).

Appendix A

List of Parties who Filed Petitions for Reconsideration in PP Docket 93-253

American Personal Communications (APC)
Association of Independent Designated Entities (AIDE)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Century Telephone Enterprises, Inc. (Century)
Citizens Utilities Company (Citizens)
Columbia PCS, Inc. (Columbia PCS)
Cook Inlet Region, Inc. (Cook Inlet)
EATELCORP, Inc. (EATEL)
GTE Service Corporation (GTE)
Hernandez, Roland A. (Hernandez)
Hicks and Ragland Engineering Company, Inc. (Hicks and Ragland)
Karl Brothers, Inc. (Karl Brothers)
Lehman Brothers (Lehman)
MasTec, Inc. (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Metrex Communications Group, Inc. (Metrex)
Minnesota Equal Access Network Services, Inc. and
South Dakota Network, Inc. (Joint) (MEANS/SDN)
National Association of Black Owned Broadcasters, Inc. (NABOB)
National Paging and Personal Communications Association (NPPCA)
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (Pacific Bell)
Pacific Telecom Cellular, Inc. (PTC)
Small Business PCS Association (SBPCS)
Telephone Electronics Corporation (TEC)
United States Interactive & Microwave Television Association (USIMTA)

Oppositions filed in Response to Petitions for Reconsideration

Association of Independent Designated Entities (AIDE)
American Personal Communications (APC)
BET Holdings, Inc. (BET)
Columbia PCS, Inc. (Columbia)
Cook Inlet Region, Inc. (Cook)
DCR Communications, Inc. (DCR)
Encompass, Inc. (Encompass)
Mankato Citizens Telephone Co. (Mankato)

MasTec (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (PacBell)
Personal Communications Industry Association (PCIA)
Telephone and Data Systems, Inc. (TDS)
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)

Replies filed in Response to Petitions for Reconsideration

BET Holdings, Inc. (BET)
City of Dallas (Dallas)
GO Communications Corporation (GO Comm.) (formerly Columbia PCS, Inc.) (Columbia PCS)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Equal Access Network Services, Inc.
and South Dakota Network, Inc. (Minnesota)
National Paging & Personal Communications Association (NPPCA)
Omnipoint Communications (Omnipoint)
Small Business Administration (SBA)

Appendix B
Rule Changes

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 301, 302, 303, 309, and 332, unless otherwise noted.

2. Section 24.703 is amended by revising paragraph (f) and adding paragraph (h) to read as follows:

§ 24.703 Competitive bidding mechanisms.

* * * * *

(f) Activity Rules. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, bidders will be entitled to request and be granted waivers of such rule. The Commission will specify the number of waivers permitted in an auction, the frequency with which they may be exercised, and the method of operation of waivers by Public Notice prior to each auction.

* * * * *

(h) Bidder Identification During Auctions. The Commission may choose, on an auction-by-auction basis, to release the identity of the bidders associated with bidder identification numbers. The Commission will announce by Public Notice before each auction whether bidder identities will be revealed.

3. Section 24.813(a)(1) is amended to read as follows:

§ 24.813 General application requirements.

(a) * * *

(1) A list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant.

* * * * *

4. Section 24.816 is removed and reserved.

5. Section 24.822(b) is revised to read as follows:

§ 24.822 Amendment of application to participate in auction for licenses in the broadband Personal Communications Services filed on FCC Form 175.

* * * * *

(b) In broadband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175 to make changes to the information required by § 24.813(a) (such as ownership changes or changes in the identification of parties to bidding consortia), provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for licenses in any of the same geographic license areas as the applicant. Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105 of this Chapter.

6. Section 24.829 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

7. Section 24.833 is added to read as follows:

§ 24.833 Post-auction divestitures.

Any parties sharing a common non-controlling ownership interest who aggregate more PCS spectrum among them than a single entity is entitled to hold (See §§ 20.6(e), 24.710, 24.204, 24.229(c)) will be permitted to divest sufficient properties within 90 days of the license grant to come into compliance with the spectrum aggregation limits as follows:

(a) The broadband PCS applicant shall submit a signed statement with its long-form application stating that sufficient properties will be divested within 90 days of the license grant. If the licensee is otherwise qualified, the Commission will grant the applications subject to a condition that the licensee come into compliance with the PCS spectrum aggregation limits within 90 days of grant.

(b) Within 90 days of license grant, the licensee must certify that the applicant and all parties to the application have come into compliance with the PCS spectrum aggregation limits. If the licensee fails to submit the certification within 90 days, the Commission will immediately cancel all broadband PCS licenses won by the applicant, impose the default penalty and, based on the facts presented, take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required time frame, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the

property as it sees fit. In no event may the trustee retain the property for longer than six months from grant of license.